

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ANDREW J. GUILFORD, JUDGE PRESIDING

ALLERGAN USA, INC.,

Plaintiff,

Vs.

MEDICIS AESTHETICS, INC., ET AL.,

Defendants.

No. CV 13-1436-AG

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SANTA ANA, CALIFORNIA

MONDAY, JANUARY 12, 2015

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1 SANTA ANA, CALIFORNIA; MONDAY, JANUARY 12, 2015; 10:35 A.M.

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4 THE CLERK: SACV13-1436-AG, Allergan USA, Inc., et
10:34AM 5 al vs. Medicis Aesthetics, Inc., et al.

6 THE COURT: Appearances, Counsel.

7 MR. KANE: Good morning, Your Honor.

8 Michael Kane for Allergan plaintiffs. With me is
9 my colleague Elizabeth Flanagan this morning.

10:35AM 10 MR. CAVANAUGH: Bill Cavanaugh for the defendants,
11 Your Honor.

12 THE COURT: So you have received the tentative.
13 It's rather brief. Let's hear from the plaintiff. The
14 problem is that adding this new person, won't they be coming
10:35AM 15 in and saying totally adjust the standing patent rules and
16 won't everything be reopened, and isn't this a powerful
17 attack on the orderly procedures contemplated by our local
18 patent rules?

19 MS. FLANAGAN: Your Honor, the answer to that is
10:35AM 20 no. We have very unique circumstances here with the
21 defendant that we're seeking to add, Q-Med.

22 THE COURT: You are guaranteeing me they won't come
23 in and ask for extensions, et cetera on the local patent rule
24 deadlines? You're guaranteeing me that won't happen?

10:35AM 25 MS. FLANAGAN: I cannot guarantee you that won't

1 happen, Your Honor. Mr. Cavanaugh may speak to that.
2 However, they should not because Q-Med has been indemnifying
3 the defendant in this case since day one. It is their
4 contractual right and they're exercising it to conduct and
10:36AM 5 control this litigation. So they have been behind every
6 theory that the defendants have asserted in this case,
7 including the invalidity contentions that are required by the
8 standing patent rules.

9 Your Honor, we know that Q-Med has adopted those
10 theories because they have taken the same positions on
11 invalidity in their inter partes review petitions that
12 they've submitted to the Patent Office trying to invalidate
13 these exact same patents. So they've already been part of
14 this case. They've created their invalidity theories.
10:36AM 15 They've been behind the scenes through the claim construction
16 proceedings, Your Honor. So they have been involved in
17 controlling this case since day one.

18 So, Your Honor, if you add them to this case, there
19 is no need to change any of the summary judgement deadlines
10:37AM 20 or the trial deadlines in this case.

21 THE COURT: Is it really important that they be
22 added?

23 MS. FLANAGAN: It's important, Your Honor, in the
24 sense that we have identified an inducement claim against
10:37AM 25 them. They are really the party that has been creating these

1 compositions, distributing them through their distribution
2 channel here in the United States. It's most efficient to
3 bring them in now since they have been behind the scenes in
4 this case crafting all of the theories, and, you know, paying
10:37AM 5 the lawyers, hiring the lawyers, creating all of the
6 strategy.

7 THE COURT: Why did you wait four months to file
8 this motion after the discovery of the supply agreement?

9 MS. FLANAGAN: Your Honor, we were trying in good
10:37AM 10 faith to get this issue resolved without bringing it to the
11 Court and causing the Court to get involved.

12 THE COURT: Did they falsely lead you on?

13 MS. FLANAGAN: Your Honor, they led us on in the
14 sense that we had meet-and-confers where they told us they
10:37AM 15 were willing to review the case law we had to see if Q-Med
16 would, in fact, be liable on an inducement theory.

17 THE COURT: You think they delayed too long in
18 reviewing that case law?

19 MS. FLANAGAN: Your Honor, in retrospect, maybe
10:38AM 20 they could have done it faster. I don't think it was
21 necessarily unreasonable they took about a week to review the
22 case law and comment on it and come back to us.

23 The parties undertook a good-faith effort to try to
24 get this issue sorted out without involving the case.

10:38AM 25 THE COURT: A good-faith effort requires four

1 months?

2 MS. FLANAGAN: Your Honor, if you look at the time
3 frame of what happened in the parties' discussions, the
4 parties' discussions on November 18th, there was a change in
10:38AM 5 course. On November 18th, Q-Med, after reviewing our case
6 law, changed their mind on liability. They acknowledged that
7 there was an inducement claim. So the parties' good-faith
8 negotiations led to a change by Q-Med. They never drew a
9 line in the sand before December 1 -- 1 -- December 1st is
10:38AM 10 when they finally drew a line in the sand and said we won't
11 agree to be added to this case no matter what.

12 THE COURT: Well, I think since respectfully, the
13 clock was ticking against you, you need to draw a line in the
14 sand. You need to say, either we get an answer from you by
10:39AM 15 August 25th, or we're bringing a motion. The clock is
16 ticking against you. It's not for them to draw lines in the
17 sand. It's for you to draw lines in the sand to get an
18 answer or file a motion.

19 MS. FLANAGAN: Your Honor, we were working towards
10:39AM 20 that goal. We did -- if you look from the time when they
21 changed their mind on December 18th to when we actually
22 moved, there was only four weeks. In that time, Q-Med
23 finally drew the line on December 1st. We came two weeks
24 later to this Court and made this motion.

10:39AM 25 Your Honor, if you look again at who Q-Med is and

1 the timing of this, they've been involved from day one.

2 Whether we moved on November --

3 THE COURT: So why didn't you sue them on day one?

4 MS. FLANAGAN: Because we didn't understand we had
10:39AM 5 a claim against them, Your Honor, until we received the
6 supply agreements. When we sued -- when we brought this
7 case, Q-Med was just known to us as a Sweden-based
8 manufacturer of the accused products. We didn't have an
9 infringement claim against them until we received their
10:40AM 10 document production in late August that showed us that they
11 were inducing the current defendants to infringe.

12 As soon as we got that claim, we started working
13 with them to bring this to closure, to get Q-Med in this
14 case, and to not cause Your Honor to be dealing with this
10:40AM 15 motion.

16 THE COURT: Tell me how you will be prejudiced if I
17 stick with this tentative?

18 MS. FLANAGAN: Your Honor, we would be prejudiced
19 in that we would not be able to just get rid of our claim
10:40AM 20 against Q-Med right now. Your Honor, you saw that there are
21 some discovery issues that we raised in this motion. I think
22 a worthwhile thing to point out to you is that since the
23 briefing closed, Q-Med has actually inserted themselves into
24 this case by virtue of the new defendant Galderma
10:41AM 25 Laboratories.

1 We received initial disclosures from Galderma on
2 December 29th in which they identified two Q-Med employees as
3 persons with knowledge and whom they would rely on to prove
4 their claims or defenses in this case. So Q-Med has inserted
10:41AM 5 themselves into this case after this motion was filed.

6 So they're taking the position that they can be
7 brought into this case to help with their sister company
8 Galderma Labs' case, but then try to prevent discovery
9 against us in terms of document discovery.

10:41AM 10 So Q-Med has jammed themselves in as part of their
11 trial strategy that they have been controlling all along. So
12 now we have Q-Med who is going to be showing up, bringing
13 people to trial in this courtroom, but their -- but unwilling
14 to show up in the caption of this case. We don't understand
10:41AM 15 why that is when there will be no prejudice to either Q-Med
16 from this addition at this point in time and will not disrupt
17 the trial schedule. We are proceeding to trial in August, as
18 Your Honor noted, and adding Q-Med will not disrupt that
19 trial date whatsoever.

10:42AM 20 That really is how Allergan's diligence ties to the
21 good cause standard here. Allergan is not asking to disrupt
22 this Court's schedule in terms of summary judgement or trial.
23 Another thing I want to point --

24 THE COURT: Let's be clear. I'm not saying
10:42AM 25 Allergan will disrupt. I'm saying a new defendant will say I

1 need more time.

2 MS. FLANAGAN: They should not say that,
3 Your Honor.

4 THE COURT: I want to be clear. You said Allergan
10:42AM 5 won't disrupt. I have to be fair to defendants added late in
6 a case.

7 Anything further?

8 MS. FLANAGAN: One other thing, Your Honor, just
9 last week the parties have agreed, of course, we will submit
10:42AM 10 this to the Court for approval, to push out the expert report
11 exchanges and expert and discovery deadlines. We had some
12 deposition scheduling issues that the parties have agreed to
13 push the exchanges out by three weeks. So we're looking now
14 at expert reports opening on --

10:43AM 15 THE COURT: Some date. Go ahead.

16 MS. FLANAGAN: With -- and fact discovery closing
17 on April 10th. So there will be plenty of time for Q-Med to
18 participate in discovery, and they are already participating
19 in expert discovery by virtue of controlling the litigation.

10:43AM 20 THE COURT: Let's turn to Mr. Cavanaugh. I asked
21 Ms. Flanagan for you to state how you would be prejudiced. I
22 listened very carefully to your answer. It wasn't a powerful
23 case of tremendous prejudice to you. The only thing I heard
24 was you will have to deal with this defendant in another
10:43AM 25 context. I gave you the chance. That's what I heard.

1 Let's hear from Mr. Cavanaugh.

2 MR. CAVANAUGH: Your Honor, when they filed this
3 case in September of 2013, they knew Q-Med was the
4 manufacturer. So from the beginning of this case, they knew.
10:44AM 5 Their new fact, they say well, there was an indemnity. The
6 indemnity goes back to 2006 agreement. The indemnity doesn't
7 create the case for inducement. Manufacturers get sued all
8 of the time for patent infringement under inducement
9 theories. The time to bring Q-Med into this case was back in
10:44AM 10 September.

11 THE COURT: How will Q-Med be prejudiced if I add
12 them now?

13 MR. CAVANAUGH: Well, they are, they submit, not
14 subject to the jurisdiction of this Court. They will have
10:44AM 15 additional discovery burdens by virtue of being a defendant
16 in this case. And I think we're going to run into a timing
17 issue. It took Allergan -- because we had to go through the
18 Hague --

19 THE COURT: Hold on. Ms. Flanagan said there will
10:44AM 20 be no effect on any deadlines. At least, she anticipated no
21 effect on any deadlines because you've been fully
22 participating as an indemnitor?

23 MR. CAVANAUGH: Q-Med has not been participating as
24 an indemnitor. They have recognized their indemnity
10:45AM 25 obligation. They have been indemnifying the defendants --

1 THE COURT: Let me be -- that's not -- the most
2 important words in my last sentence was fully participating,
3 not in what capacity.

4 Have you been fully participating?

10:45AM 5 MR. CAVANAUGH: To some degree, but not -- not
6 Q-Med. It's been -- the discussions, frankly, have been
7 between Galderma, which is a US-based company and which has
8 agreed to be added as a defendant in this case. Frankly,
9 Your Honor, it's been Galderma, a US company, which consented
10:45AM 10 to -- I have not had any discussions with Q-Med, as a
11 practical matter.

12 THE COURT: Anything else?

13 MR. CAVANAUGH: The two witnesses when Gal --
14 through my discussions with Galderma, I learned of the
10:46AM 15 identity of --

16 THE COURT: How do the two witnesses relate to the
17 matter now pending before me?

18 MR. CAVANAUGH: They are knowledgeable regarding
19 the manufacturing process and the development of the
10:46AM 20 infringing products.

21 THE COURT: If that was meant to give me an
22 explanation, I didn't catch it. Sorry. I don't know whether
23 it's relevant to whether I should add new defendants.

24 MR. CAVANAUGH: It's not. It's just a point
10:46AM 25 Ms. Flanagan raised. In Galderma's initial disclosures,

1 we -- when we came into information regarding relevant
2 witnesses, two witnesses in Q-Med --

3 THE COURT: I'm not understanding how that is
4 relating to this motion? Anything else?

10:46AM

5 MR. CAVANAUGH: No. That's it, Your Honor.

6 THE COURT: Reply. Particularly, reply, why did
7 you need the supply agreement and notice of indemnification?
8 Wasn't knowledge of them being the manufacturer of the
9 infringing product enough?

10:47AM

10 MS. FLANAGAN: No, Your Honor, it wasn't enough.
11 We didn't know they were controlling activities here in the
12 US.

13 They are the manufacturer in Sweden. So we have to
14 have --

10:47AM

15 THE COURT: If they're manufacturing an infringing
16 product, isn't that enough?

17 MS. FLANAGAN: No, Your Honor, I don't think it is.
18 I think we need additional control to show that there is
19 actual inducement. I wanted to respond to a point that
20 Your Honor raised about whether Q-Med was participating in
21 this case. I wanted, again, to point out that --

10:47AM

22 THE COURT: Let me ask you this, though, if you
23 know they are the manufacturer, isn't that something you
24 should have focused on at the very beginning through
25 discovery or otherwise to see if there might have been an

10:47AM

1 indemnification?

2 MS. FLANAGAN: Your Honor, we did do that. We
3 served document requests and interrogatories asking for
4 information about Q-Med's role with respect to the accused
10:47AM 5 products and to the defendants that we sued --

6 THE COURT: For a case filed in 2013, you were not
7 able to get that information until far later?

8 MS. FLANAGAN: No, Your Honor. That's right. We
9 did not.

10:47AM 10 THE COURT: Okay.

11 MS. FLANAGAN: This spring we were spending time --

12 THE COURT: All right. What else?

13 MS. FLANAGAN: I wanted to point out that, again,
14 Q-Med has assumed the defense of this action. That's what
10:48AM 15 they told the Patent Office in their inter partes review.
16 They are also using the same expert witness in their inter
17 partes review, as they've disclosed here, as their expert on
18 validity and non-infringement.

19 THE COURT: Thank you all. I've listened to the
10:48AM 20 argument. I was particularly interested in any prejudice
21 that might be affecting the different parties to this motion.
22 Having listened to all of the argument, I'm going to stick
23 with the tentative for the reasons set forth in the
24 tentative. Thank you.

10:48AM 25 MR. CAVANAUGH: Thank you, Your Honor.

MS. FLANAGAN: Thank you.

(Proceedings concluded at 10:50 a.m.)

CERTIFICATE

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT
TRANSCRIPT OF THE STENOGRAPHICALLY RECORDED PROCEEDINGS IN
THE ABOVE MATTER.

FEES CHARGED FOR THIS TRANSCRIPT, LESS ANY CIRCUIT FEE
REDUCTION AND/OR DEPOSIT, ARE IN CONFORMANCE WITH THE
REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

/s/ Miriam V. Baird

01/28/2015

MIRIAM V. BAIRD
OFFICIAL REPORTER

DATE